KAREN P. HEWITT
United States Attorney
ALESSANDRA P. SERANO
Assistant U.S. Attorney
California State Bar No. 204796
Federal Office Building
880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 557-7084
Email: alessandra.p.serano@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR0438-JAH
Plaintiff,	)	Date: July 14, 2008 Time: 10:30 a.m.
v.	)	
GREGORY MICHAEL BOX,	)	GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM
Defendant.	)	
	)	TOGETHER WITH MEMORANDUM OF POINTS AND AUTHORITIES

The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and ALESSANDRA P. SERANO, Assistant United States Attorney, hereby files its supplemental sentencing memorandum.

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I

STATEMENT OF THE CASE

On February 21, 2008, a single count information was filed charging Defendant, Gregory Michael Box, with possession of images of children engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B). Defendant was arraigned on the information and entered a guilty plea that same day. Defendant has not spent anytime in custody as he appeared in court pursuant to a notice to appear.

On July 10, 2008, Defendant untimely filed a 30+ page sentencing memorandum which references a psychological evaluation. This supplemental memo addresses this psychological evaluation.

II

STATEMENT OF FACTS

A. Background of Case

The Pre Sentence Report (pages 1-4) sets forth an accurate factual background surrounding the offense conduct. In summary, between 2004-2006, Defendant was engaged in sexually charged "chats" via computer with various female minors, aged 12-14, where he would solicit pictures of the minors engaged in sexually explicit conduct. PSR at 1-2. One such chat was with an undercover officer posing as a 14 year old girl named "Tara." PSR at 1. On several occasions, Defendant received various images from several different minors and would comment via computer "chats" how he liked these images. PSR at 1-3. Moreover, he discussed his feelings and interactions with female minors in his neighborhood. PSR at 2.

B. The Search Warrant

On December 15, 2006, agents with ICAC executed a federal search warrant on Defendant's home. Agents informed Defendant and his wife, Nicki, that a search warrant would be executed. His wife asked Defendant, "what is this about" to which Defendant replied "his internet chats." His wife told agents that she thought the warrant had something to do with her personal use marijuana and the two marijuana plants growing in the yard. She said that she smokes marijuana to ease pain related to arthritis. She does not have a medical prescription for it. Nicki also stated that she was aware that Greg uses a screen name "unclefunday" because that's what his niece calls him.

Nicki also stated that she confronted her husband after watching Dateline's "To Catch a Predator" and asked if he is "doing anything like that" on the computer. Defendant told her he wasn't and stated he would not put his whole family at risk. Nicki also stated that her husband is impotent and believed he view pornography online to "help his sex drive." She now thought her husband was "sick" and a "pervert" because he was viewing child pornography.

Agents seized three computers, a hard drive and loose media from the residence. A preliminary preview showed only one computer as having evidence of child pornography on it. That computer was identified by Defendant as his computer.

C. Defendant's Statements at the Time of the Search Warrant

At the time of the search warrant, Defendant was interviewed without his Miranda rights read. The entire conversation was recorded and later transcribed. He was advised that he was not under arrest, not in custody and did not need speak with agents. However, Defendant chose to speak with agents and provided his password to his computer. He admitted to having sexually explicit chats with underage girls for the past 3-4 years, as young as 12 years of age, but denied ever trying to really pursue it. He believed that 75% of the chats were with girls aged 13-15 years of age and 25% with girls 15-17 years of age. He admitted to asking for and receiving naked pictures of the minor girls and admitted sending pictures of his exposed penis and images of other adults having sex to the minor girls he chatted with. He also admitted that there would be child pornography (both images and videos) on his computer - 70% child pornography and 30% adult porn. He said he spends a couple hours a day on the computer looking at child pornography or chatting with girls.

He admitted to using other screen names like unclefunday, at7wannabe8 and uncle7inch among others.

He later admitted there was a 12 year old girl in San Diego that wanted to get together with him but he never pursued it. He also said there was a girl in San Jose, California who wanted to get together but he lost contact with her. He thought there was another one in Iowa as well. He stated that he knew there was a "line" that should not be crossed. He further stated that he would be too afraid because he's seen too many Dateline's "To Catch a Predator" shows.

III

POINTS AND AUTHORITIES

This supplemental sentencing memorandum addresses the psychological evaluation submitted by Defendant. According to the report, Defendant was evaluated by Clark R. Clipson, a licensed psychologist located in San Diego. Dr. Clipson gave Defendant five different psychological tests: (1) Mini-Mental Status Examination (MMSE), (2) the Paulhus Deception Scales (PDS), (3) the Million Clinical Multiaxial Inventory, 3rd Edition (MCMI-III), (4) Screening Scale for Pedophilic Interests (SSPI)[1] and (5) the Multiphasic Sex Inventory, 2nd Edition (MSI-II) and evaluated him via clinical interview. With each standardized test, Dr. Clipson noted his conclusion based upon Defendant's scores, however, he did not provide all the raw data or scores for each test. Below is a brief background and description of each test and its intended purpose.

A. Mini-Mental Status Examination (MMSE)

The MMSE or "Folstein" test is a brief 30-point questionnaire that is used to test cognition, and most commonly used to screen for dementia and other personality disorders. See Folstein, MF, et al., "Mini-mental state", Journal of Psychiatric Research, Vol. 12, No. 3 (Nov. 1975) [article located at http://www.minimental.com/article.html.] The test takes about ten minutes and samples various functions including arithmetic, memory and orientation. For example, one question asks the patient to copy a drawing of two interlocking pentagons. The test was introduced by Dr. Marshal F. Folstein in 1975. Id.

Interpretation of the test provides that any score of 27 (out of 30) is normal, 20-26 indicates mild dementia, 10-19 moderate dementia and below 10, severe dementia. See Crum, RM, et al., "Population-Based Norms for the MMSE by Age and Educational Level", Journal of American Medical Association,

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[1] Although this test is listed as having been administered, there is no information on the results of this test.

Vol. 269(18) (May 12, 1993). No research indicates that this test was designed to test sex offenders or those individuals convicted of sex offenses for recidivism or pedophilia.[2]

Defendant scored a perfect 30 which would indicate, according to the test's inventor, Dr. Folstein, that he has no form of dementia or "cognitive impairment."

B. Paulhus Deception Scales (PDS)

The PDS test was designed to measure the tendency to give socially desirable responses in other tests. The test was invented by Delroy L. Paulhus and takes 5-7 minutes to administer. The Paulhus Deception Scales, also known as Version 7 of the Balanced Inventory of Desirable Responding (BIDR), is a 40-item self-report questionnaire designed to measure the tendency to give socially acceptable or desirable responses. Paulhus, D.L., The Balanced Inventory of Desirable Reporting, Toronto/Buffalo: Multi-Health Systems Publ. (1998).

The test permits the patient to rate on a scale of 1 to 5 whether they agree, somewhat agree or not agree with a statement. An example of statements would be "I sometimes feel irritated when don't get my own way" or "I never get jealous of others good fortune."

While Dr. Clipson claims Defendant scored above average, he failed to include the actual raw data and put any basis for his reasoning and ultimate conclusion that "he is aware of his shortcomings but is attempting to appear socially acceptable." Without more information ,it is not possible to evaluate Dr. Clipson's conclusions. As with the previous test, there is no research to indicate that this test was designed to test sex offenders or those individuals convicted of sex offenses for recidivism or pedophilia.

C. Millon Clinical Multiaxial Inventory, 3rd Edition (MCMI-III)

The MCMI-III is designed to provide treatment information in the areas of personality disorders and clinical syndromes. See Buros Institute of Mental Measurements located at http://buros.unl.edu/buros. It is a standardized, self-report questionnaire that takes about 25 minutes to administer. The MMCI-III consists of 28 clinical personality scales, Modifying Indices

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[2] The American Psychiatric Association in its main diagnostic manual, the DSM-IV TR, section 302.2, defines a pedophile as an adult who "over a period of six months, [has] recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexually activity with a prepubescent child or children (generally age 13 or younger)." This diagnosis may be further specified as Exclusive Type (attracted only to children) or Nonexclusive Type (attracted to both children and adults).
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(Disclosure, Desirability, Debasement, Validity), Clinical Personality Patterns (Schizoid, Avoidant, Depressive, Dependent, Histrionic, Narcissistic, Antisocial, Aggressive (Sadistic), Compulsive, Passive-Aggressive (Negativistic), Self-Defeating), Severe Personality Pathology (Schizotypal, Borderline, Paranoid), Clinical Syndromes (Anxiety, Somatoform, Bipolar: Manic, Dysthymia, Alcohol Dependence, Drug Dependence, Post-Traumatic Stress Disorder), Severe Clinical Syndromes (Thought Disorder, Major Depression, Delusional Disorder). Peer review suggests that this test has “little or no appropriate research base...” *See* Richard I. Lanyon, *Psychological Assessment Procedures in Sex Offending,* 32 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 253, 254 (2001).

As with the previous test, there is no research to indicate that this test was designed to test sex offenders or those individuals convicted of sex offenses for recidivism or pedophilia.

D. Multiphasic Sex Inventory, 2nd Edition (MSI-II)

The Multiphasic Sex Inventory is a self-report questionnaire which consists of statements about sexual activities, problems, and experiences. See Multiphasic Sex Inventory II (Nichols and Molinder, 1984). It has scales which assess the level of openness about the deviant sexual behaviors. Interpretation of the test is only available by sending the answer sheet to the test authors, and no published research could be found on the validity or on any other aspect of the test. *See* Richard I. Lanyon, *Psychological Assessment Procedures in Sex Offending,* 32 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 253, 255 (2001). It is unknown whether the test sheet was actually submitted to the authors or not.

Apparently, the test is intended to be used in assessing sex offenders to develop treatment plans and to be used during treatment to assess progress. However, it is also sometimes used to assess an individual who denies sexual abuse to determine whether the individual actually is an abuser.

However, this test is not intended for this purpose and should not be used when the defendant is denying the offense. The manual accompanying the MSI states, "[I]t is important to remember that the MSI is not appropriate for use in the legal pursuit of guilt or innocence. The alleged offender must acknowledge culpability in order for the inventory to be used." (Nichols and Molinder, 1984, p.

39). It must never be used on an individual who denies being a sex offender or as part of an assessment to determine whether someone who denies an alleged sex offense is likely to have actually done it.

E. Static-99 Risk Assessment Device

The Static-99 is a brief actuarial instrument designed to estimate the probability of sexual and violent recidivism among adult males who have already been convicted of at least one sexual offense against a child or non-consenting adult. *See, STATIC-99 Coding Rules Revised - 2003,* pp. 5.[3] The problem with using the Static-99 in this case is that the Defendant has not been "convicted of a sexual offense against a child or non-consenting adult." The Coding Rules published by the author of the Static-99 expressly state that it is not recommended for offenders who have only been convicted of possession of pornography/indecent materials. *See, STATIC-99 Coding Rules Revised - 2003,* pp. 5, 14. (emphasis added).

The Government could not find any Ninth Circuit case addressing the use of the Static-99 at sentencing in a child pornography case. However, recognizing that the experience of other jurisdictions is not binding, it is worth noting that the Court of Appeals of the State of Ohio recently considered the efficacy of the Static 99 in a child pornography case in which the accused was appealing his classification as a sexual predator. The Defendant's counselor had used the Static-99 test, but the court psychiatric clinic did not, the Court noted, because: "[T]he test is not meant to be used unless a person is charged with or convicted of having sexual contact." State v. Vanek, 2007 WL 4126660, *3 (Ohio App. 8th App. Cir. November 21, 2007) (dicta).

The authors of the Static-99 also warned users that they did not record *any* Internet crimes in the original samples for the STATIC-99, because the Internet had not advanced to the point where it was commonly available when they were doing their research. *See, STATIC-99 Coding Rules Revised - 2003,* at 47. While the Static-99 may have utility in a child molestation or a rape case,[4] as applied to Defendant, conclusions regarding his level of risk based on this device would be of dubious validity/materiality.

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[3] *See*, http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf.

The evaluator's attempt to use a risk assessment device coded for "hands-on" sex offenses, designed to predict whether the person will commit another "hands-on" sexual offense, simply does not "fit" the facts of this case. Since the evaluator's opinion that Defendant is a "medium-low risk" to reoffend cannot be stated with any level of scientific certainty, it amounts to nothing more than a pseudo-scientific "wild guess." The evaluator's conclusion that the Defendant is a "medium-low risk to reoffend" exceeds the capability of the Static-99, violating Association for the Treatment of Sexual Abusers[5] Standard 18, and ATSA Guidelines 18.06, 18.07, 18.08 and/or 18.09. Accordingly, the evaluator's opinion does not have sufficient indicia of reliability, should not be admitted at the Defendant's sentencing and should not be considered by this Court.

F. Defendant is Not Taking Full Responsibility for His Conduct

While Defendant has admitted his guilt to possession of child pornography, Dr. Clipson's report also reveals that Defendant shifts the blame for his behavior of viewing child pornography and unlawful and inappropriate conversations and sexual activities with minor females via the computer on (1) it "just" happened, (2) the minor female victims because the "victim was sexual", and (3) his wife because he was "sex deprived." See Clipson Report at page 10. According to Clipson's report, Defendant believes that his conduct of viewing, distributing and receiving child pornography over the course of many years by his own admission and chatting with underage females (in the 10-12 age range) about unlawful sexual conduct is not just his fault but the fault of the victims and his wife. This does not comport with a person who has plead guilty, knows he has a serious problem and needs treatment.

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[4] The authors of the STATIC-99 have proposed an updated version, the STATIC-2002, *See,* http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200301_static_2002_e.pdf, suggesting that the device is a work in progress, even with respect to contact sex crimes for which it was designed.

[5] Association for the Treatment of Sexual Abusers (ATSA) is an association of mental health professionals who treat sex offenders. See http://www.atsa.com. ATSA maintains written standards and guidelines for its members to follow in preparing evaluations of male sex offenders. It is unknown whether Dr. Clipson is a member of ATSA.

In fact, Dr. Clipson notes that Defendant's "excuses" for his behavior are of some concern. See Clipson Report at 12-13. The Government shares this concern. Moreover, given the fact that Defendant has been seeing psychological treatment since December 2006 and the prognosis is as Dr. Clipson states in his report, it appears that Defendant needs intensive sex offender treatment prior to his release to the community given the fact that out patient treatment does not appear to have an effect on Defendant.

G. Response to Defendant's Request for a Sentence of Probation

Defendant's request for a sentence of probation is wholly inadequate based upon the facts in this case. While Defendant cites to several recent out of Circuit/District cases where the district court departed outside the guideline range (see pages 6-10), all of the district courts from around the country imposed a custodial sentence for the child pornography offenses, and did not impose a straight probationary sentence. This was precisely the point illustrated by the Government's reference to the Eleventh Circuit case, United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008), where the Court noted that other than one unpublished case from the Fifth Circuit, all other appellate courts have consistently overturned zero-imprisonment or other "sharply downward-varying sentenced" for child pornography offenses. United States v. Pugh, 515 F.3d 1179, 1203 (11th Cir. 2008). This Court should impose a custodial sentence.

H. Government's Sentencing Recommendation

Based upon the above information which reveals that (1) the tests given to Defendant were not designed to assess individuals convicted of child pornography, (2) the fact that Dr. Clipson has concerns about Defendant's acceptance of responsibility for his actions, (3) Dr. Clipson rates Defendant as a "medium-low risk" offender and (4) no test, evaluator, or anyone else can affirmatively state that Defendant is not a danger to the community without intense sex offender treatment, it is the Government's recommendation that a custodial sentence of 46 months is warranted with a recommendation to be placed at FMC Devens where a Residential Sex Offender Treatment Program is available or some other federal facility where an intensive sex offender treatment is available (a minimum sentence of 24 months is required for full treatment). Upon release, a term of supervised release of 6 years.

IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court sentence the Defendant to 46 months in custody, the low end of the advisory guidelines, followed by 6 years of supervised release, and impose the $100 penalty assessment.

DATED: July 11, 2008.

Respectfully submitted,
KAREN P. HEWITT
United States Attorney

/s/ Alessandra P. Serano

ALESSANDRA P. SERANO
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY BOX, Defendant.	Case No. 08CR0438-JAH CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, ALESSANDRA P. SERANO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Supplemental Sentencing Memorandum, on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Mary Francis Prevost, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2008.

s/Alessandra P. Serano
ALESSANDRA P. SERANO